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National Nurses Organizing Committee-Texas/National Nurses United (Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center, an Indirect Subsidiary of HCA Holdings, Inc.) and Esther Marissa Zamora. Case 16-CB-225123

May 20, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL
AND RING

The motion of the Acting General Counsel to the National Labor Relations Board to remand the complaint to the Regional Director for dismissal or, alternatively, to dismiss the complaint is denied.

“[T]he Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.” *Flyte Tyme Worldwide*, 362 NLRB 393, 393 (2015) (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957), *enfd.* 251 F.2d 639 (6th Cir. 1958)). Thus, where relevant evidence has already been adduced at a hearing, the General Counsel no longer retains absolute control over a complaint. See *Graphic Arts International Union (Kable Printing Co.)*, 230 NLRB 1219, 1219 (1978); *General Maintenance Engineers*, 142 NLRB 295, 295 (1963). Here, a full hearing has been completed, the judge has issued his decision, and exceptions and briefs have been filed, including an amicus brief. Indeed, the Board, the parties, and the amicus have all expended considerable time and resources in the litigation of this case. This matter has been fully litigated, and the controversy at issue, which remains active, is ripe for Board adjudication. See *Retail Clerks, Local 1288 (Nickel’s Pay-Less Stores)*, 163 NLRB 817, 817 fn. 1 (1967) (“When a matter has ripened to the point of being before the . . . Board for decision, we must of course give paramount weight to the public interest affected by withdrawal of the underlying charge.”), *enfd.* 390 F.2d 858 (D.C. Cir. 1968). Further, this case presents significant legal issues regarding the duty of fair representation and the appropriate framework for resolving allegations that a union

breached that duty by failing to provide a requested copy of a pre-recognition agreement. This case presents the Board with an opportunity to examine these issues, based on a fully briefed and litigated record, and to provide guidance to employees and unions alike. Accordingly, after careful consideration, we conclude that the Acting General Counsel’s motion should be denied.

Dated, Washington, D.C. May 20, 2021

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

I would grant the Acting General Counsel’s motion as reflecting an appropriate exercise of his prosecutorial function under Section 3(d) of the National Labor Relations Act.¹

Certainly, determining whether to permit the Acting General Counsel to abandon the case is—at this juncture—a matter for the Board to decide.² But I would not deny a motion like this one simply because the parties and the Board have already expended resources in litigating and adjudicating the case. Prior investment of resources does not justify expending further resources, as the Board has recognized.³ Nor is there an imperative need to provide legal guidance to the parties and the public here. As the Board has explained, our “primary purpose is to resolve actual disputes; the guidance flowing from such resolutions can be beneficial, but it is not the prime reason for the decision.”⁴

Here, the Acting General Counsel has determined that “further prosecution of the Complaint undermines current Board law and is not in the public interest.” In these circumstances, I would not require him to pursue the case further.⁵

Dated, Washington, D.C. May 20, 2021

¹ Sec. 3(d) provides that the General Counsel “shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. §153(d).

² This is not a case, however, where the charging party seeks to end the litigation, raising different considerations. Compare *Flyte Tyme Worldwide*, 362 NLRB 393, 393 (2015); *Retail Clerks, Local 1288*

(*Nickel’s Pay-Less Stores*), 163 NLRB 817, 817 fn. 1 (1967), *enfd.* 390 F.2d 858 (D.C. Cir. 1968).

³ See *Dow Chemical Co.*, 349 NLRB 104, 104–105 (2007). See also *800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 368 NLRB No. 60, slip op. at 3 (2019) (dissenting opinion).

⁴ *Dow Chemical Co.*, *supra*, 349 NLRB at 105.

⁵ Cf. *Greyhound Lines, Inc.*, 235 NLRB 1100, 1112 (1978).

Lauren McFerran,

Chairman

NATIONAL LABOR RELATIONS BOARD